SUPREME COURT, U.S.

No. 1138

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In the Supreme Court of the United States

OCTOBER TERM, 1966

BANK OF UTAH, a Utah corporation, and BANK OF BEN LOMOND, a Utah corporation,

Petitioners,

vs.

COMMERCIAL SECURITY BANK, a Utah corporation,

Respondent.

Brief for Respondent in Opposition to Petition for Writ of Certiorari

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OPINIONS BELOW

The opinion of the Court of Appeals is reported in 369 F.2d 19. The opinion of the District Court is reported in 1965 Trade Cas. ¶ 71,540.

JURISDICTION

The District Court had jurisdiction under 15 U.S.C. § 15, the Court of Appeals under 28 U.S.C. § 1291, and this Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Petitioners (plaintiffs in the District Court) base their claims on Sections 1 and 2 of the Sherman Act, which the petition adequately quotes.

QUESTIONS PRESENTED

Petitioners' Questions 1 and 2 are *not* present for they presuppose, as fact, what both courts below found to be untrue. They postulate that employees *"are required"* or *"compel[led]"* to have checking accounts at respondent bank. Both courts below found that employees were not required or compelled to do anything. Petitioners' Question 3 relates to a judgment rendered against them under Utah law on a counterclaim for tortious interference with a contract. That question postulates that the contract appellants interfered with was illegal under the Sherman Act. Since it was not, as both courts below held, the question vanishes.

The sole question is whether both courts erred in holding that there was no violation of the Sherman Act in an arrangement, terminable at the will of either party, whereby an employer engages a bank to use its computer facilities to handle its payroll for such employees who voluntarily elect to be paid in this way.

STATEMENT OF THE CASE

Petitioners seek to bring the case here after a plenary trial in the District Court, followed by comprehensive opinions in both the District Court and the Court of Appeals, with a full set of findings of the District Court wholly endorsed and concurred in by the Court of Appeals. In view of the "two court rule", *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275; *Berenyi v. Immigration Service*, 385 U.S. ..... (Jan. 23, 1967), we rest our recital of the facts almost entirely upon the findings and statements of fact in the opinions.

The development of computers has simplified record keeping and has made it possible to handle large payrolls more efficiently and cheaply. Since most employers cannot afford to own computer equipment, a practice has arisen to engage the services of a bank. The employer informs the bank of the names of its employees, their salaries and the various deductions that must be made (e.g., withholding tax, social security, authorized union dues, group insurance premiums, etc.) and entrusts to the bank a lump sum adequate to cover the payroll. The bank computes the amounts due each pay day to each employee, attends to preparing all necessary records, and pays the employees. For this service it makes a service charge. If the employer maintains an account with the bank, an earnings credit on the account may cover the charge.

This case involves such arrangements between respondent and each of the Ogden, Utah, School Board and the Weber County, Utah, School Board, entered into after competition in which petitioner Bank of Utah participated. In the words of the Court of Appeals (Pet. A-2):*

> "In order to reduce the costs and simplify the process of handling their payrolls, the Ogden Board in 1961 and the Weber Board in 1963 requested area banks to submit proposals for the performance of payroll services. Appellee [respondent] and First Security Bank submitted bids to both boards; *appellant Bank of Utah submitted a bid to the Weber Board.* In both cases the bid of appellee [respondent] was accepted. Contracts terminable at the will of either party were executed, under which the 'no-check' service is provided in return for a fixed monthly charge."

In offering its service to the Weber Board, petitioner Bank of Utah wrote to it thus:

> "You are probably aware of the changes that have been taking place in payroll accounting, in which businesses and

*The opinion of the Court of Appeals is printed as Appendix A to the Petition at pages A-1 to A-18.

governmental agencies have joined with individual banks *in progressive efforts to help hold down the mounting costs of administration.*

* * * * * * *

"We realize that cost reduction is always a consideration in your planning and * * * the Bank of Utah is fully prepared to offer a complete service in this field." (D. Ex. B, R. 462-464)*

Having lost out to respondent in the competitive race for the business, petitioners conceived the idea of invoking the Sherman Act to gain what they had lost by the operation of competition and brought this suit. They "conceded * * * that '* * * there has been no per se violation of the Antitrust Act and we are relying on the rule of reason * * *.'" (So stated in the opinion of the Court of Appeals, Pet. App. A-7.) But they assailed the contracts between the school boards and respondent as illegal under Section 1 of the Act as working an "unreasonable restraint of trade". And they charged a violation of Section 2, claiming no "monopolization" but limiting the charge to that of an "attempt to monopolize" commercial banking.

Under the arrangement between respondent and each school board, the bank enters to the credit of each employee participating an amount equal to his pay; the employee is allowed two "free checks" per month, so that without any charge, burden or hindrance he may transfer the funds to any other bank or to anyone else or withdraw it as cash. Moreover, under an arrangement requested by petitioners and acquiesced in by respondent, the latter will automatically transfer any employee's credit balance to either petitioner, if authorized to do so by the employee.

No employee is required or compelled to accept a credit at respondent. Under Utah statute, every employee has a right to be paid in cash or by check of his employer, if he so chooses.

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*"R." refers to the Record below.

(U.C.A. Section 34-10-4).* At the outset respondent pointed out to each of the school boards that no employee could be forced into the plan. It gave to the Ogden Board (R. 78) a copy of an opinion of counsel that under this law an employee had to be paid by cash or check unless he elected to be paid by the proposed procedure (P. Ex. 9, R. 373) and incorporated the opinion in its proposal to the Weber Board (P. Ex. 46, R. 449, 459). Each employee paid under the plan has first voluntarily signed and delivered to respondent the signature cards and other documents necessary to the opening of a checking account (R. 80). The District Court's Finding 3 finds (Pet. App. A-34†):

> "3. Pursuant to the contract, the Clerk of the Ogden Board determines to which employees of the Board it is more economical and convenient for it to pay wages by warrants drawn and delivered to them by the Board, and which can more conveniently and economically be paid by using the services of defendant. The Clerk requests employees falling in the second category to sign the documents necessary to open checking accounts in their names in defendant, and the Board each month by means of a single warrant furnishes to defendant funds sufficient to cover the total net wages of employees *who voluntarily agree to this procedure.*"

Finding 4 states (Pet. App. A-34):

> "* * * Pursuant to the contract, defendant performs for the Weber Board services similar to those performed for the Ogden Board, and the employees of the Weber Board *who*

*Utah Code Annotated (1953), section 34-10-4 provides:

> "He [the employer] shall pay such wages in full, in lawful money of the United States, or checks on banks convertible into cash on demand at full face value thereof."

†The District Court's Findings appear as Appendix C to the Petition at pp. A-33 through A-39. Finding 3 is misquoted in that appendix by the omission of the words "of defendant" at the end of the first sentence and the words "The Clerk requests employees falling in" at the beginning of the second sentence.

> *voluntarily agree to have accounts in the defendant bank* are paid in the same manner and have the same checking privileges as those granted to the employees of the Ogden Board."

These findings were not even assailed by petitioners on the appeal, and the Court of Appeals endorsed them fully. Its opinion states (Pet. App. A-11):

> "the school board contracts were terminable at will; the boards voluntarily maintained funds on deposit with Commercial Security; the employees voluntarily agreed to have the special checking accounts;"

The District Court found as to the charge under Section 1 of the Sherman Act that there was no restraint of trade at all and that whatever occurred was reasonable. Its Finding 15 (Pet. App. A-37) reads:

> "15. The contracts between defendant and the Ogden Board, the Weber Board, and St. Benedict's whether viewed singly or together, are not in restraint of trade and commerce, are reasonable, do not constitute a combination or conspiracy in restraint of trade or commerce, * * *. None of the contracts restrains any person or trade, and each of them encourages, fosters and enhances competition between the commercial banks doing business in Utah inter se and between the banks and other persons, firms and corporations engaged in the business of rendering data processing services."

As to the Section 2 charge, the District Court's Finding 15 (Pet. App. A-37) states that the contracts

> "do not constitute an attempt by defendant to monopolize any part of trade or commerce * * *. The record does not establish that defendant has the intent or the ability to monopolize any part of trade or commerce, and there is no evidence that defendant might attain a monopoly in anything."

The Court of Appeals affirmed a judgment for respondent (defendant). It held that if there was any "restraint involved in having to take some affirmative action to transfer funds from Commercial Security to the bank of the employee's choice" (Pet. App. A-8), it was "minimal" and "reasonable" (Pet. App. A-11), and it held that the finding that there was no attempt to monopolize was "clearly correct" under the evidence (Pet. App. A-12). Further, it held, the evidence adduced to support the claim that petitioners had sustained damage was "simply too tenuous" (Pet. App. A-10).

DISCUSSION

It is difficult to characterize the attempt to base a Sherman Act case on the facts as anything but bizarre. The case can aptly be described by a sentence in *H. E. Fletcher Co. v. Rock of Ages Corporation*, 326 F.2d 13, 17 (2 Cir.):

> "Despite the conventional antitrust trappings with which the case has been draped, what we have here, so far as the papers show, is essentially a private squabble between two sets of * * * businessmen."

Patently, there is no illegality in a bank's performing payroll bookkeeping for an employer. This is so inescapable that petitioners concede it, despite their discontent that the school boards each year deposit with respondent $6,700,000 to meet payrolls (Pet. 19). Almost at the end of the petition, they bring their whole case to this focus (Pet. 29-30):

> "Respondent and the respective employers purported to be selling and buying computer time and services. (R. 85, 93.) Petitioners did not and do not now object to Respondent entering the computer service business if it chooses to do so. Petitioners' sole objection is that the requirement that each employee have a checking account with Commercial Security in order to receive their pay pursuant to the contracts is unlawful."

As already stated, there was *no* requirement that any employee have a checking account at respondent. But quite apart from that, the contention is readily seen to be empty. Just as there can be no objection to the bank's performing the payroll bookkeeping, it is patent that there is no illegality in the employer's transmitting a lump sum to the bank and in the latter's receiving it to act as the disbursing agent to pay to employees their wages and salaries. One bank cannot complain that an employer maintains its entire payroll account at another bank, or that the other bank has succeeded in a competitive race to obtain the accounts of a number of employers.*

As the disbursing agent, the bank must then get the pay to the employees. If it were to follow the archaic practice of paying each employee, in cash, by delivering to him an envelope containing currency or silver, petitioners would not be objecting (at least they could not). Or if the bank were to mail to each employee either a check drawn by the school board or a cashier's check of the bank, there would be no objection. Whether the check was the school board's or the bank's, the employee would endorse it, cash it at his grocer's or supermarket or the like, or deposit it in some bank.

The difference between this procedure and what was done was, from the standpoint of pragmatics, one of simplification and, from the standpoint of law, nothing at all. The use of checks and checking accounts, which characterized the first half of this century, eliminated the need of transporting cash and replaced it by the transmission of pieces of paper. The use of computers, arising in the '60s, leads to further simplification of our credit economy by making it possible to eliminate the issuance and handling of endless pieces of paper by substituting speedy electronic transmission of credits and debits. In the present case, instead of the employer or bank writing a payroll check to the

*What the legal result would be were a state of monopolization achieved might be a different question, but there was no such charge in this case.

employee's order, *the employee himself is permitted to write his own payroll check.* Instead of signing his name on the back of his paycheck by endorsing it, the employee puts his signature on the front, by signing his name as the drawer. Whether he has placed his name on the back of a slip of paper—a check—as an endorser, or on the front as the drawer, he then does exactly the same thing with that piece of paper; he cashes it at the grocer, pays a bill, or deposits it in some bank. Both courts below recognized the simplicity of the matter:

> "* * * the employee merely writes on the face of a check instead of placing an endorsement on the back of a payroll check" (Opinion, District Court, Pet. App. A-25).
>
> "* * * there are two free methods by which funds can be transferred from the special accounts (the effort involved in writing a personal check and depositing it in the bank of one's choice cannot be much greater than endorsing a paycheck and depositing it)" (Opinion, Court of Appeals, Pet. App. A-11).

Petitioners' argument about employees' maintaining accounts at respondent bank loses sight of substance in words and ignores elementary principles of the law of "bills and notes." An account is nothing but a credit. If an employer deposits its payroll funds in a bank of its choice, as it has every right to do, and draws its own check to the employee's order, the effect of that action is to instruct the bank to pay to the employee or his order a sum of money against the credit theretofore possessed by the employer. That, of course, is the very nature of a check, as shown by the Uniform Negotiable Instruments Act (N.I.L.) in effect in every state before the new Commercial Code.* An exact equivalent

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*N.I.L., Sec. 185:

"A check is a bill of exchange drawn on a bank payable on demand".

N.I.L., Sec. 126:

"A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer."

would be for the employer to give the bank a general instruction to "honor" or "accept" drafts drawn on it by the employee up to certain amounts, and to charge the employer's account. Thus N.I.L. Sec. 132 provides that "The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer"; N.I.L. Sec. 135 provides that "An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon faith thereof, receives the bill for value." The setting up of a credit in the amount of his salary in the name of each employee is equivalent to just such a prior agreement by the bank to accept the employee's draft, i.e., to pay the amount to him or his order against a credit theretofore possessed by the employee. If some charge were imposed on the employee in following this course, another question might arise. But no such burden was. The right to draw two checks without any charge enables the employee to place his pay anywhere he wants, exactly as before, and yet saves the employer the expense and burden of preparing, delivering, and reconciling payroll checks and saves the bank the expense of the unnecessary intermediate step of preparing and delivering checks. To talk about requiring employees to have a checking account with respondent is simply fallacious.

In the end, petitioners are forced to concede that no compulsions and no coercions are placed on anyone, that employees *are not constrained against their will* to do or to refrain from doing anything. The real burden of petitioners' complaint is that the set-up is so "convenient" for the employee that he is "sold" on the idea of maintaining an account with respondent; in other words, he is persuaded to do so in the exercise of his own free will. The alleged "restraint" is found in "the practical factors of convenience and simplification of customer relations" (Pet. 26). The Court of Appeals analyzed the evidence in detail and found it lacking, "simply too tenuous" to show that even this occurred

(Pet. App. A-10), although it thought it "unrealistic to say that Commercial Security did not realize some net increase in deposits" (Pet. App. A-6).

But if so, it is a tribute to the beneficent results of competition. Competition is prized because it leads to goods and services more "convenient" to the public. If respondent, instead of offering a payroll service based on data processing equipment, had offered a service of having couriers on motorcycles call on the school boards for the payroll checks, deliver them to the employees, offer to wait for their endorsements and bring them back for deposit, this would have been a "convenience", but no one would think of condemning it under the Sherman Act because it brought customers to respondent who formerly banked with a petitioner. "The weapons in competition are various. Superior energy . . . more convenient packages . . . and many others, are and always have been considered proper weapons", *Sinclair Refining Co. v. Federal Trade Commission,* 276 Fed. 686, 688 (7th Cir.), aff'd 261 U. S. 463.

The Sherman Act is designed to *protect competition,* not disgruntled *competitors* who claim to have lost business from the very competition which the antitrust laws command. *Federal Trade Commission v. Sun Oil Co.,* 371 U. S. 505, 519; *Atlas Building Prod. Co. v. Diamond Block & Gravel Co.,* 269 F.2d 950, 954, cer. den. 363 U. S. 843; *Ben Hur Coal Co. v. Wells,* 242 F.2d 481, 486 (10 Cir.) cer. den. 354 U. S. 910. The ideal of free competition and the emphasis placed on it by the antitrust laws rest on the conviction that the race for the public's good will and favor will bring to the public lower prices *and better services* by acting as a stimulus to the wit and invention of man. The antitrust laws do not prohibit, they encourage, the development and utilization of new instrumentalities to serve mankind. *Winn Ave. Warehouse, Inc. v. Winchester Tobacco Co.,* 339 F.2d 277, 281 (6 Cir.). The scientific creation of modern computers in the last decade has made

it possible to meet payrolls by new methods which save the employer both time and money, and the development of the kind of payroll service involved in this case was one of the beneficent results of the free play of competition.

As for the claim of an "attempt to monopolize" violative of Section 2 of the Sherman Act, an essential element of that offense is the specific intent to destroy competition or build a monopoly. *Times-Picayune v. United States,* 345 U. S. 594, 626; *Independent Iron Works, Inc. v. U. S. Steel Corporation,* 322 F.2d 656, 667 (9 Cir.), cer. den. 375 U.S. 922. Intent is a pure question of fact, and both courts below have absolved respondent of any guilty intent. As the Court of Appeals said (Pet. App. A-12):

> "Appellants point to no evidence in contradiction to the court's finding that no such intent was here present, and we thus have no basis on which to hold the finding clearly erroneous. Indeed, the reasoning in the court's opinion that the presence of the two free methods for transferral of funds to other banks 'negatives any claim of intent to monopolize' would seem to be clearly correct."

CONCLUSION

It is respectfully submitted that the petition should be denied.

Dated: San Francisco, California, April 5, 1967.

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